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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., ET AL., PETITIONERS

v.

ROBERT O. MCDONNELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in support of the petition for a writ of certiorari filed by the Warden and Associate Warden of the Nebraska Penal and Correctional Complex. Petitioners seek review of a decision of the court of appeals setting forth standards applicable to inmate discipline and custody. The United States, through its penal agencies, is directly concerned with the consequences of this decision insofar as it may affect procedures regarding the management and con-

trol of federal prisoners in facilities in the Eighth Circuit and elsewhere.

ISSUES PRESENTED

1. Whether the same due process requirements applicable to parole and probation revocation proceedings announced by this Court in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli* are applicable to prison disciplinary proceedings.

2. Whether such newly-announced standards should be given retroactive application so as to invalidate prior prison disciplinary proceedings.

3. Whether the court below properly held that prison officials are barred from opening incoming mail from attorneys to inspect for contraband.[1]

STATEMENT

On July 1, 1970, respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, brought a civil rights action under 42 U.S.C. 1983 in the United States District Court for the District of Nebraska. He alleged that disciplinary proceedings in the Complex were conducted in violation of procedural and substantive due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing prisoners' mail were unconstitutionally restrictive.

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[1] We take no position with regard to the other questions raised in the petition.

An evidentiary hearing was conducted by the district court[2] at which respondent and other inmates testified with regard to matters alleged in the pleadings. The court also received testimony from a number of prison officials. On April 21, 1972, the district court granted partial relief, finding, *inter alia*, (1) that the prison policy of reading all incoming and outgoing mail was improper, and (2) that prison authorities were not required to provide inmates with procedural due process at disciplinary hearings (Pet. App. 15-47; 342 F. Supp. 616 (D. Neb.)).

The court of appeals reversed in part and remanded holding that the procedural due process requirements articulated by this Court in the context of parole and probation revocation proceedings (*Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778) "should be generally followed" with respect to prison disciplinary hearings (Pet. App. 4). It therefore directed the district court to determine what requirements were necessary to meet these standards, including the circumstances in which assistance of counsel may be required. The court of appeals further concluded that in those instances where past disciplinary hearings had not been held

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[2] Prior to the hearing, District Judge Urbom issued a temporary injunction enjoining petitioners from opening mail from respondent's attorney or from respondent to his attorney. Following a hearing limited to that injunction, at which petitioners presented testimony of then Warden Sigler and other state officials detailing the practical considerations underlying the need for perusal of all mail, Judge Urbom withdrew the temporary injunction (Pet. App. 21-22; 342 F. Supp. at 622-623).

in compliance with these new requirements, determinations of misconduct must be expunged from the record (Pet. App. 7). Finally, the court of appeals affirmed that portion of the district court's holding striking down the prison regulation which called for the opening and reading of mail to and from attorneys (Pet. App. 11-13).

ARGUMENT

In deciding that all of the procedural due process requirements applicable to parole and probation revocation proceedings, as outlined in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli*, are applicable to prison disciplinary hearings, the court below has rendered a decision not only substantially extending the teachings of *Morrissey* and *Scarpelli*, but also basically at odds with the underlying rationale of those decisions. Indeed, its views in this respect are contrary to those of every other court of appeals that has passed on this issue. See *Braxton* v. *Carlson*, 483 F. 2d 933 (C.A. 3); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (C.A. 7); *Adams* v. *Carlson*, No. 73-1268 (C.A. 7), decided August 23, 1973;[3]

[3] In *United States ex rel. Miller* v. *Twomey*, *supra*, the Seventh Circuit expressed "disagreement with the proposition that whatever procedural safeguards are required for a parole (or probation) revocation hearing are also necessarily applicable to an in-prison disciplinary hearing." 479 F. 2d at 716, n. 31. Accordingly, the court held that there is no absolute right to confront or cross-examine witnesses and said it was doubtful that counsel or a lay substitute is essential. *Id.* at 715. The court held, however, that due process required at

Sostre v. *McGinnis*, 442 F. 2d 178 (C.A. 2) (*en banc*), certiorari denied *sub nom. Oswald* v. *Sostre*, 405 U.S. 978. Thus, the instant decision, in misconstruing *Morrissey* and *Scarpelli*, creates a clear conflict among the circuits on an issue which is of pressing importance to state and federal correctional officials.

Of equal importance is the holding below that *Morrissey* should be given retroactive application in the prison disciplinary setting (Pet. App. 7). Not only is this ruling contrary to the rule of *Morrissey* itself, it also adds to a serious conflict among the courts of appeals in the context of both parole revocation and prison disciplinary hearings. Compare *Valdez* v. *Perini*, 474 F. 2d 19, 20-21 (C.A. 6); *Zizzo* v. *United States*, 470 F. 2d 105, 108 (C.A. 7), certiorari denied, 409 U.S. 1012; *M'Clary* v. *California Adult Auth'y*, 466 F. 2d 1122, 1124 (C.A. 9), with *Adams* v. *Carlson*, *supra*.

In short, for several important reasons discussed more fully below, plenary review by this Court is called for.

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least that a prisoner receive advance written notice of the charges against him and be afforded a fair opportunity to explain his version of the events (possibly including a right to insist that witnesses be called or interviewed) and that the factual determination must not be made by the officer who reported the infraction. *Id.* at 715-716. In *Adams* v. *Carlson*, *supra*, the Seventh Circuit held that the standards of *Miller* applied to prior disciplinary actions in a federal prison and remanded the case to the district court to determine whether the *Miller* standards were satisfied and whether they should be enlarged. The United States is presently considering whether to petition for certiorari in *Adams* v. *Carlson*.

1. A major consideration prompting this Court in *Morrissey* to adopt minimal due process requirements in parole revocation hearings was the fact that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievious loss' on the parolee and often on others." 408 U.S. at 482. It is this element of personal liberty—qualified though it may be—that materially differentiates a probationer or parolee from a prisoner. "Though the State properly subjects [the parolee] * * * to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *Ibid.* It is thus a "serious deprivation" (*Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 781) to have one's parole or probation revoked. Moreover, the seriousness of such a decision is compounded by the question whether revocation is not "unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Id.* at 785. It was in such a context that this Court decided that certain minimal due process requirements had to be met before revocation was justified. The Court indicated that it would be an entirely different matter to extend these requirements to the prison setting—where authorities have the problem of "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey*, *supra*, 408 U.S. at 483.[4]

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[4] The court of appeals gave no consideration to the threshold question in the *Morrissey-Scarpelli* analysis, *i.e.*, whether the action in question involves a deprivation of "liberty" within

Prison discipline involves dealing with the misconduct of a substantial population of men or women of diverse criminal background, who are placed in confinement under the supervision of comparatively few custodians. This environment presents frequent physical dangers and psychological pressures. See *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D. D.C.). With this in mind, the Third Circuit has noted (*Braxton* v. *Carlson*, *supra*, 483 F. 2d at 941):

> The focus of the Adjustment Committee function is rehabilitative rather than punitive. We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses, and written record could be self-defeating. We are apprehensive of the volatile effect such adversarial proceedings could have on internal prison control and stability. We fear that prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point by formal adversarial proceedings often involving varying shades of minor infractions.

This is not to suggest that no regularized procedures should be adopted to meet the disciplinary

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the contemplation of the due process clause of the Fifth or Fourteenth Amendment, and it would appear to be an open question whether such liberty as a prisoner may have is also within the contemplation of the due process clauses of the Constitution. But see *United States ex rel. Miller* v. *Twomey*, *supra*, 479 F. 2d at 712-715, 716-718. However, petitioners do not contend that prison disciplinary sanctions involve deprivation of a prisoner's liberty within the meaning of the Constitution.

problems of the prison situation. It is simply to say that those procedures must be keyed to the problems and needs for which they are created. Such an objective is not served by the automatic transplantation to the prison scene of the *Morrissey-Scarpelli* standards, which are meant to serve entirely different problems and needs. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," and "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey, supra*, 408 U.S. at 481. In the prison setting, consideration of what process is due requires an evaluation of the nature of the government function and the interest served by less formalized disciplinary procedures, as against the inmates' interest in more structured requirements. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895.

The Third Circuit, in *Braxton* v. *Carlson, supra*, has recently had occasion to explore the question of what process is due prison inmates in institutional disciplinary actions. While that case involved a federal correctional institution, it presented due process issues comparable to those involved in the instant case. In *Braxton*, the court specifically rejected adoption of the wide-ranging procedural standards mandated by this Court in other contexts, in favor of formulation of due process safeguards specifically appropriate for the prison disciplinary setting. It found erroneous the assumption that the prison disciplinary proceeding is adversarial in the same sense as is a criminal trial, pointing out that "[d]ue process in a

correctional institution setting should not be 'so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.'" 483 F. 2d at 940 (quoting *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 778). The court went on to conclude (483 F. 2d at 940):

> In light of the combined goals of fact determination and correctional treatment and rehabilitation intrinsic in the Adjustment Committee's tasks, we agree with the Second Circuit that due process is present when facts are rationally determined in a proceeding where the prisoner (1) is notified of the accusation and informed of the evidence against him, and (2) is afforded a reasonable opportunity to explain his actions [citing *Sostre* v. *McGinnis*, *supra*].

Such procedures are followed in federal prison institutions as a matter of course. In the Federal Prison System, the Adjustment Committee or Treatment Team has the basic responsibility for administration of inmate discipline. The Committee consists of at least three members, *i.e.*, the Associate Warden (or, in the case of a minimum security institution, the Camp Superintendent) as chairman, a case worker, and a correctional officer. The Committee has access to a broad range of dispositional alternatives: it may exonerate the inmate and order the charge removed from his record; it may release him from segregation with time served; it may continue him in segregation with further review at a later time; it may order him returned to the general population subject to certain restrictions, withdrawal

of certain privileges, or removal from certain programs or job assignments or quarters; it may recommend the inmate be transferred to another institution; and it may refer the matter to the Good Time Forfeiture Board.

An inmate charged with misconduct is advised of the specific charges by a staff member other than the reporting officer and is given an opportunity to state his version of the incident. Within 24 hours after the placement in segregation, investigation of the report of misconduct is completed by the staff member, and written notification of charges is given the inmate. If the charges are serious, the matter is referred to the Adjustment Committee, which meets at least three times a week. When the inmate is called before the Committee, he is again advised of the charges and asked for a statement with reference thereto. If the inmate denies the charges or the Committee has some doubt about them, the matter may be referred back for further investigation. Witnesses are generally not called, nor is the reporting officer available for cross-examination. The Committee's determination is based on a review of the misconduct report, the results of the investigation, and any supporting information or statements. The Adjustment Committee report must clearly state the offense, place and time of occurrence, and witnesses; it must also include a clear statement of the conclusions of the Committee as to the inmate's involvement in the prohibited act, the information upon which the conclusion is based, and the Committee's

disposition. Finally, the inmate must be advised in writing of the Committee's decision. See Bureau of Prisons Policy Statement 7400.5B, "Inmate Discipline," issued June 6, 1972.[5]

The Adjustment Committee cannot withdraw an inmate's accrued good-time credits. The Adjustment Committee refers violations to the Good-time Forfeiture Board for consideration of forfeiture of earned or accrued good time. The Board consists of three members. At the Board's hearing, the inmate is given a copy of the charges and is advised of the procedures. If the inmate states that the charges are correct, he is given an opportunity to offer a statement in mitigation. If he denies the charge, he is advised that he may have a member of the staff represent him before the Board, and he is given an opportunity to meet with this representative. After the report of misconduct and the evidence supporting it are received, the inmate is permitted to make a statement and request witnesses on his behalf. If a witness is unavailable, his written statement may be submitted. After considering the report of misconduct and compiling a summary of findings, the committee may recommend to the Warden forfeiture of good time. The Warden reviews the report and orders such forfeitures as he deems proper. The inmate may appeal the Warden's decision to the Office of General Counsel, Bureau of Prisons. See Bureau

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[5] Copies of the Bureau of Prisons policy statements regarding inmate management are being lodged with the Clerk of this Court and served on counsel for the parties.

of Prisons Policy Statement 7400.6A, "Withholding, Forfeiture, and Restoration of Good Time," issued August 13, 1971.

We submit that such procedures, which take account both of the institutional setting and the needs of the prisoner, are sufficient to provide the "procedural protections * * * the particular situation demands." *Morrissey, supra*, 408 U.S. at 481. To the extent that the decision below held that additional procedures are required by due process, it should be reversed.

2. In remanding this case to the district court with directions to determine the minimum due process standards necessary under *Morrissey* and *Scarpelli*,* the court of appeals indicated that these standards should be given retroactive application. Thus, the

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* We concur with Nebraska's contention that the court of appeals erred in directing that the district court adopt the appropriate due process standards without first permitting prison officials an opportunity to formulate suitable guidelines. In our view, the proper initiators of change in existing procedures are the professional prison administrators and not the courts. We do not mean to suggest that federal courts must abstain altogether from eliminating arbitrary procedures; rather, we suggest that prison officials should be given the initial opportunity to adopt sufficient safeguards. As the Third Circuit properly observed with regard to the role of the courts in formulating affirmative guidelines for prison administrators: "Our expertise is limited; our knowledge of the extensive day to day prison problems is minimal; our ability to foresee the effect of procedural changes on treatment, rehabilitation and programmatic process is imperfect." *Braxton* v. *Carlson, supra*, 483 F. 2d at 942. See also *Morrissey* v. *Brewer, supra*, 408 U.S. at 488-489; *Sostre* v. *McGinnis, supra*, 442 F. 2d at 205.

court observed that in cases where prior disciplinary hearings failed to comport with the new standards, the misconduct reports should be expunged from prison records (Pet. App. 7).

There is no support for this novel doctrine of retroactivity. In *Morrissey, supra*, 408 U.S. at 490, this Court made clear that its due process requirements were "applicable to *future* revocations of parole * * *" (emphasis added). Even if the substantive principles of *Morrissey* were applicable to prison disciplinary actions, there is no basis for a rule of retrospective application. *Morrissey* recognized the severe disruption to state and federal correctional systems that would follow in the wake of guidelines not previously mandated or employed. The same considerations apply with even more compelling force in the area of prison disciplinary proceedings. During fiscal 1973, the United States Board of Parole conducted 1173 revocation hearings; during the same period, however, the Federal Bureau of Prisons held approximately 19,000 misconduct hearings.[7] The impact of retroactive application of standards relating to misconduct hearings would therefore be enormous. Particularly in light of the lesser impact of prison disciplinary actions on the individual's liberty, there is thus no reason to depart here from the *Morrissey* rule of prospectivity.

3. We agree with the petitioners that the decision below takes an unrealistic approach to attorney-in-

[7] There were approximately 18,000 Adjustment Committee hearings and 100 Good-Time Forfeiture Board hearings.

mate correspondence, although we do not address ourselves to the Nebraska prison rules under review insofar as they differ from the current rules of the Federal Bureau of Prisons.

Pursuant to policies presently in effect, the Federal Bureau of Prisons does not open or inspect correspondence from inmates addressed to an attorney.[*] With respect to incoming mail, correspondence addressed to an inmate by an attorney may be opened, but solely for purposes of inspection for physical contraband. This mail is not read or copied. In addition, inmates are advised that, at their option and with the concurrence of their attorney, mail from the attorney will be opened only in their presence. See Bureau of Prisons Policy Statement 2001.2B, "Access to Legal Reference Materials and Legal Counsel and Preparation of Legal Documents," issued May 8, 1972.

Under the Nebraska rules involved in this case, all mail between prisoners and their attorneys was opened, inspected and read. 342 F. Supp. 635-636. The courts below held that this practice was unjustified and invalid (Pet. App. 11-13).

It is axiomatic that prison authorities may not, through correspondence regulations, hamper an in-

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[*] Attached to the inmate's letter is a statement from the chief executive officer of the institution advising counsel (1) that the facility retains the right to open mail from attorneys to inspect for physical enclosures constituting contraband, (2) that such mail will not be read or copied, and (3) that inspection will be conducted in the presence of the inmate, if the attorney so indicates on the envelope.

mate's access to the courts (*Ex parte Hull*, 312 U.S. 546), and correspondence with counsel is an essential element of that access. Limited inspection of incoming mail from counsel, however, as conducted under current federal regulations, does not unduly infringe on these principles, and does not, as a practical matter, impair an inmate's access to the court or to his attorney. We submit that the extent of inspection provided for by the federal prison rules strikes a permissible balance between the inmate's right to correspond with counsel and the practical needs of prison authorities to maintain some control and surveillance over materials entering the prison.[9]

Accordingly, at least to the extent that the court of appeals' decision would bar even the limited inspection practices of the Federal Bureau of Prisons, it is unsound and warrants review by this Court.[10]

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[9] Although the court below characterized the introduction of contraband by attorneys as a remote possibility, we note that the firearm used during the escape attempt by convict George Jackson, which led to the slaying of the three California prison guards, was apparently brought into the prison by his attorney. See *New York Times*, Aug. 23, 1971, p. 1. We understand that the attorney has since been indicted for this action, although he has not yet been apprehended.

[10] This Court's decision in *Procunier* v. *Martinez*, No. 72-1465, argued December 3, 1973, may have some bearing on this issue.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

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